93-814

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

Conrad John Husman, Petitioner

vs.

CLIMAX MOLYBDENUM COMPANY,
a Delaware corporation,
CLIMAX NON-CONTRIBUTORY
RETIREMENT INCOME PLAN,
BARBARA RANDALL,
Administrator, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If a pension plan grants the administrator the discretion to both interpret the plan and to prescribe procedures for the filing of applications for pension disability retirement benefits, may she set application standards, disability prerequisites and other procedures which differ from the plain language of the pension plan and which unreasonably restrict application for plan benefits?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE TENTH CIRCUIT

Petitioner, Conrad John Husman,

respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit refusing to find that the District Court's opinion which granted summary judgment for the Respondent and upholding a judgment which found that the plan administrator's ruling refusing to grant Petitioner the full measure of his disability pension benefits was not arbitrary, capricious, unreasonable, or in bad faith.

OPINIONS BELOW

The opinion of the Court of Appeals appears in Appendix A to this Petition. The written opinion of the District Court in and for the State of

Colorado appears in Appendix B of this Petition.

JURISDICTION

The Court of Appeals, Order and Judgment in this matter was filed on June 8, 1993. This Court's jurisdiction is sought under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1132(a)(1)(B), 29 U.S.C. §1104(a)(D) and 29 U.S.C. §1133 are set forth in Appendix C.

STATEMENT OF THE CASE

The United States District Court,

State of Colorado, had jurisdiction pursuant to 29 U.S.C. §1132(e)(1).

On December 7, 1989, Petitioner filed a Complaint asking for relief under the Employee Retirement Income Security Act (ERISA) 29 U.S.C. §1001 et seq.

Petitioner worked fifteen years in the Climax Mines until 1977 when his back gave out.[1] He was then placed on a medical leave of absence without benefits. He filed a 1977 grievance which included the Climax benefits department asking he either be returned to work or granted medical retirement. Under the grievance he

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[1] See the November 30, 1984 report of Mr. Husman's treating physician Robert S. Young, II, M.D. setting forth his orthopaedic problems (Appendix D), which report was submitted with his 1986 Metropolitan application.

asked to "receive benefits due him and be made whole in every way." In response, Climax company stated "The company may be liable for some benefits. The Company has not and cannot make payment of benefits until Mr. Husman establishes his entitlement to contractually guaranteed benefits. Mr. Husman has failed to do this". In 1979, an Arbitrator stated in pertinent part as follows:

> The Union asserts that the Employer was obligated to submit to the company's insurance carrier on behalf of the Grievant, an application/recommendation for medical retirement. Dr. Smith (Climax Medical Director) testified that he had considered the possibility of making such a recommendation but could not do so because he could not cite a medically definable situation as a basis

> for medical retirement. He testified further that without a favorable recommendation from him, he saw no possibility that the insurance carrier would consider granting medical retirement benefits. I believe that Dr. Smith's decision was in good faith and assuming it is in accord with the insuring agreement, the text of which is not in evidence, I find no basis for setting it aside.

Respondent Climax Molybdenum Company, (Climax) and the Oil, Chemical and Atomic Worker's International Union, AFL-CIO (Union) had entered into a "Climax Non-Contributory Retirement Income Plan" (Plan), among which benefits for vested participants like Mr. Husman,

were disability retirement benefits.[2]

Climax used Metropolitan to administer disability claims. Petitioner claims he should be entitled to receive Plan disability benefits from the date of his disability, to wit : his last day of work, April 28, 1977, not from the onset date actually granted by the Plan administrator of October 30, 1986, the date chosen because it was the date an April, 1986 application for a separate group insurance benefit administered by Metropolitan Insurance Company, (Metropolitan), was received by Metropolitan.

This separate five-year "total

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[2] Entitled "total and permanent disability", defined as follows: A physical or mental condition...which permanently prevents the Employee from engaging in any regular employment with the Company or in any other regular gainful occupation...(Exhibit E).

and permanent disability" (T&P) benefit paid through and administered by Metropolitan defined commencement of benefits and disability differently from the terms under the Plan.[3]

The Respondents' Motion for Summary Judgment was granted and upheld in the Court of Appeals. The District Court held that the Plan Administrator's custom of determining when Plan disability benefits were payable - when Metropolitan granted its benefits - was reasonable, although Plan benefits are payable

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[3] The Metropolitan benefit defined "totally and permanently disabled" as follows: Three months after receipt by the Insurance Company, of due proof that the Employee...has become totally and permanently disabled..so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit, the Insurance Company will commence to pay...

when an employee can no longer engage in any regular gainful employment and Metropolitan benefits are payable when he cannot perform any work for compensation or profit. Respondents convinced the Courts below that it was a reasonable interpretation of the Plan language to grant Plan disability retirement benefits only after an application was received and granted for Metropolitan benefits, but that Husman did not "apply" for Plan benefits when he demanded "medical retirement" in his 1977 grievance.

The Plan gave its administrator the discretion to interpret the provisions of the Plan, to prescribe procedures for filing applications for benefits and to determine eligibility

for benefits.[4]

The crux of the case is therefore whether or not the administrator's power to prescribe procedures and pre-requisites for qualification of benefits allows her to require conditions for application and set other disability standards which differ from the Plan language.

Petitioner Husman received, according to contract, the following disability benefits: In 1980, an Arbitrator granted him the Metropolitan 52 week accident and sickness benefits, retroactive to 1977.[5] In January, 1985, an Administrative Law Judge of the Social

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[4] See "Administration of the Plan", Appendix E.

[5] Benefits awarded were $105.00 per week, total payment was $5,460.00 less.

Security Administration found Husman disabled within the definition of the Social Security Act since April 29, 1977. In April, 1986, Husman received worker's compensation benefits beginning June, 1983. Husman was placed on a separate company non-total disability benefit from 1981-1986. Climax finally sent Husman an application for Metropolitan total and permanent benefits in the Spring of 1986. This T&P application Husman completed and returned to Climax on April 25, 1986. Climax forwarded same to Metropolitan on October 30, 1986.

Petitioner's position is therefore that once he made a claim for medical retirement benefits, although the company's refusal to offer an application to him was upheld by an arbitrator, the administrator

could not reasonably limit the retroactivity of Plan benefits to the date Metropolitan granted benefits on the grounds that he had not earlier applied. Instead, Randall should have awarded Plan benefits as of the date Husman became disabled according to its terms. After the Plan Administrator sent Counsel letters[6], Counsel then requested a hearing. Ms. Randall denied it as follows:

Q: Did you ever receive a request for hearing in this matter from Mr. Husman or myself?

RANDALL: From you.

Q: Was that request for hearing under the pension plan

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[6] Appendix H

agreement, to your knowledge?

RANDALL: ERISA has rights.

Q: Isn't there a provision in the supplemental agreement that provides that if someone doesn't - has a disagreement with your administrative decision under the pension disability plan portion of it, that they can request a hearing from you?

RANDALL: Yes. However, at the time I don't think it was a determination as to whether it was going to be a pension disability hearing or a T&P hearing.

Q: Did you grant a hearing?

RANDALL: No.

To understand this case, it is necessary to set forth the Administrator's prerequisites for Plan disability benefits.

The Plan Administrator testified that she used following procedure to determine disability retirement eligibility under the terms of the Plan:

1. A member had to be on the Metropolitan accident and sickness program for 52 weeks in order to apply for the Metropolitan T&P Benefits.[7]

[7] In 1977, Husman was not allowed to receive the first prerequisite for pension Plan disability because he was receiving worker's compensation benefits. Then there was a dispute as to an offset Climax claimed he owed for past advances.

2. An application for Metropolitan total and permanent (T&P) benefits would be sent to the member.

3. Once Metropolitan granted T&P benefits, a document entitled "Request for Payment Information", (defining terms of payment), would be sent to the member.[8]

4. Once the "Request for Payment Information" was received, an "Application for Retirement and Election of Benefits" is sent to the member.

Plan Administrator Barbara Randall testified as follows:

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[8] A dispute as to when payments would commence was settled by Stipulation in the District Court without prejudice to this claim.

Q: Are you aware of any request by Mr. Husman to Ms. Bogunovich, based upon your review of the file, that would indicate that Mr. Husman in 1986 made an application for pension retirement benefits as opposed to a T&P benefit?

RANDALL: Not that I can remember.

Q: Do you want to add to that question based upon the consultation with your attorney?

RANDALL: The T&P application made with the insurance company is used to determine when a disability retirement would be in effect.

Q: I'm not sure that's

responsive to the question that I asked you, but as I understand, and correct me if I'm wrong - as I understand your prior testimony, you testified that in order to apply for disability pension benefits, Exhibit 3, (entitled "Application for Retirement and Election of Benefits"), claimant would first have to fill out an Exhibit 4 ("Request for Payment Information"). Is that a correct statement of what you testified to?

RANDALL: Yes, after I received the determination from Metropolitan or the life insurance company that they

awarded a T&P disability.

Q: All right. Well, first they have to determine that a worker - an ex-worker is qualified for T&P before you do anything; is that a fair statement?

RANDALL: Yes.

Q: All right. Then, you ask for more information before you take an application for the pension disability benefits; is that a fair statement?

RANDALL: We would ask for a request for payment information for the employee to fill out, yes.

Q: And after you would get the payment information of Exhibit 4, then you would

send to the applicant an Exhibit 3 to apply for disability retirement pension benefits under the pension plan; isn't that correct?

RANDALL: Yes.

xxx

Q: That is the procedure you just described as far as first someone applies from Exhibit 1, (a Metropolitan form entitled "Statement of Claim for Total and Permanent Disability Benefits"), you hear back from Metropolitan, you send an Exhibit 4, and then you supply an Exhibit 3; is that the procedure? (Discussion off the record between the

deponent and her counsel.)

RANDALL: Before Exhibits 1, 2, 3, and 4 are applicable, you must be on what we call the company accident and sickness program for 52 weeks to even be eligible to apply.

Q: Is someone who is - has been on the accident and sickness program for 52 weeks eligible to apply for a T&P?

RANDALL: Yes.

Q: And would that person normally have to come to the benefits office to get an application, or would one ordinarily be sent to him?

RANDALL: What application are you talking of?

Q: Exhibit 1.

RANDALL: Exhibit 1, yes.

Q: What's the answer? Would you have to go to the office or would one be sent to him at some point in time during the 52 weeks of accident, sickness? Would it be sent to him or would he come to get it?

RANDALL: It would be sent to him.

Q: Is there a procedure to determine whether someone is eligible under the accident, sickness?

RANDALL: Yes.

Q: And that has its own procedure, correct?

RANDALL: Yes.

Q: And does it require - and tell me if this is accurate or not: Does it require a

determination whether somebody can return to work or not?

RANDALL: Yes.

Q: And if somebody can't return to work, for what period of time are they given an accident, sickness form ordinarily?

RANDALL: The first day - well, I can't say the first day. Accident and sickness, under the present plan you would have to miss five days of work before the time would start.

Q: Do you know if your office, and in reviewing your industrial relations administrator records, if your office sent Mr. Husman

an Exhibit 1?

RANDALL: It's hard to say. I wasn't there, so I don't know.

xxx

Q: That's what we are talking about in this case. Is there anything in that language that states that you can't determine retroactively?

RANDALL: First of all, you have to apply for the benefit.

Q: Did Mr. Husman apply for the benefit?

RANDALL: Which benefit are we talking about?

Q: Did he apply for pension-retirement pension disability benefits under

the pension plan?

RANDALL: I sent him the Exhibit 4 in October of '87. No, he did not apply.

Q: Did you make a determination that he was entitled to it nevertheless?

RANDALL: Entitled to what?

Q: We are talking pension benefits. We are talking disability retirement under the pension plan now.

RANDALL: Yes, I made a determination he was entitled to it.

The eligibility for Plan disability retirement benefits are set out in Appendix E, which states the benefits are calculated "as of the date he becomes permanently and

totally disabled".[9]

All Plan retirement benefits other than disability retirement benefits are payable to an eligible member but not "prior to the date proper application therefore is received by the Administrator", whereas disability retirement benefits are payable to he or she "who has applied therefor, commencing as of the first day of the month after a determination of his Total and Permanent Disability has been made by the Administrator...".[10] There is no

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[9] Climax sought to change the Plan in March, 1981 (Appendix G) prior to April, 1981, when Husman was "terminated for medical reasons", but Union representative Ralph Miller testified no change took place at that time. This modification addressed a company non-total disability benefit awarded Husman in 1981.

[10] See Appendix E.

definition of "apply" within the Plan.[11] The Respondents argued below that "the same application form is used by Climax to apply for disability retirement and total disability insurance benefits".[12]

Barbara Randall, the Plan administrator, testified at deposition as follows:

Q: You would begin - ordinarily wouldn't it be - wouldn't it sum up your policy to say that you begin your benefits when Metropolitan begins their benefits; is that more clear way to say it?

RANDALL: Are you asking would I begin

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[11] See Appendix E.

[12] "Defendant's Memorandum Brief in Support of Motion for Summary Judgment" p. 3.

the employee's disability pension benefit whenever Metropolitan began the T&P benefit?

Q: Correct.

RANDALL: Yes.

Q: And that would not necessarily be retroactive from the date that Metropolitan makes their decision?

RANDALL: Not always, no.

Petitioner argued before the District Court and the Tenth Circuit Court of Appeals that the Plan Administrator had acted arbitrarily, capriciously, unreasonably, was not substantially justified, and in bad faith.

The Tenth Circuit found that

Husman had not applied for benefits until April, 1986, and Randall's selection of October, 1986 as the effective date of eligibility because it was the date upon which Husman became eligible for Metropolitan disability benefits, was reasonable.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons: This Petitioner presents an issue discussed by this Court, but not specifically decided by the Court and the Opinion below conflicts with the prior ruling of this Court in Firestone Tire and Rubber Company v. Bruch, 489 US 101, 103, LEd 2480, 109 S Ct 948(1989) and with the purpose of ERISA.

The rulings below are repugnant

to the purpose of ERISA "to protect contractually defined benefits." Bruch, supra, at 489 US 113 citing Massachusetts Mutual Life Ins. Co. v. Russell, 473 US at 148, 87 L Ed 2d 96, 105 S Ct 3085. The Plan Administrator's procedure in this case operated to deny, delay and revise Husman's contractually defined disability retirement benefits under the Plan.

This Court stated in Bruch the following:

> A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable.

Firestone Tire & Rubber Co. v. Bruch, 489 US at 111. This Court in Bruch, did not, however, specifically state the standard

administrative procedure of a plan, as opposed to its interpretation. Can an administrator who has the power to establish procedures for benefit qualification, as here, set up unwritten rules separate and apart from the plan language to establish her own application and qualification standards?[13] 29 U.S.C. §1104. The fiduciary must, however, discharge his duties "in accordance with the documents and instruments governing the plan". 29 U.S.C. §1104(a)(D).

It was held below that the administrator acted reasonably in basing her decision upon the Metropolitan determination. There is,

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[13] Justice Brennan reasoned that the cornerstone of an ERISA plan was "a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits". Fort Halifax Publishing Co. v. Coyne, 482 US 1, 9, 96 LEd 2d 1, 10, 107 S Ct 2211 (1987).

however, a three-month waiting period (and perhaps more) before those benefits could be awarded after application, but no such limitation of Plan disability benefits. The definitions of disability differ. Admittedly, the administrator had to make a determination of disability,[14] but it was not reasonable for her to do so using different standards, and by Respondents' delaying applications for other benefits deemed preconditions for Plan disability retirement benefits.[15]

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[14] Petitioner argued below that it was unreasonable for Randall to delegate that duty to Metropolitan.

[15] See Appendix F. February 17, 1977 memo from Climax Benefits Coordinator Carolyn M. Forscher states "we do not accept any claims while you are receiving other compensation", indicating the difficulty Husman had applying for accident and sickness benefits, the granting and receipt for one year of which was considered by

A wrong interpretation of the Plan, although consistent,[16] can be considered arbitrary and capricious Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (CA5 1982). Contra: Bayles v. Central States, Southeast, Etc., 602 F.2d 97, 100 (CA5 1979).

The Administrator denied Husman retroactive benefits prior to October, 1986 because he had not allegedly

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Respondents a prerequisite for Metropolitan T&P benefits the granting of which the administrator considered a precondition and an application for Plan pension disability benefits. See Music v. Western Con. of Team. Pen. Trust Fund, 660 F.2d 400 (CA9 1981), vacated and remanded, 459 US 810, 74 LEd 2d 48, 103 S Ct 35, 712 F.2d 413, 419 (CA9 1983), but see Gaines v. Amalgamated Ins. Fund, 755 F.2d 288, 290 (CA3 1985).

[16] Respondents argued below that some eighty-four applicants from 1972-1988 were subject to Plan approval by either the Metropolitan policy herein or a similar Connecticut General policy "Defendant's Memorandum Brief in Support of Motion for Summary Judgment", Exhibit K thereto. The Plan was established in 1958.

applied for them sooner. Her admitted policy was to construe an application for Metropolitan benefits as an application for Plan benefits.[17] The written application for Metropolitan T&P benefits was actually received by Climax on April 25, 1986. Once Husman made his 1977 written demand for T&P benefits or medical retirement benefits, Randall could not reasonably claim Husman had not applied for Plan benefits even under her own construction of the Plan.[18] There is no definition of "apply" within the Plan. Randall's position linking applying for Plan benefits to a prior application for Metropolitan benefits

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[17] See her deposition testimony hereinabove.

[18] Respondents stipulated that for purposes of Summary Judgment, Husman was disabled, within the meaning of the Plan, from April 28, 1977.

Climax refused to send Husman and later restricting plan benefits because he did not earlier apply is arbitrary Reiherzer v. Shannon, 581 F.2d 1266, 1272 (CA7 1978) (no definition of "self-employed").

The Tenth Circuit decision at bar conflicts with the Tenth Circuit's holding in Torix v. Ball Corp., 862 F.2d 1428, 1431 (CA10 1988) and Helms v. Monsanto Co., 728 F.2d 1416, 1420 (CA11 1984), which circuit cases struck down substantially identical language of the Metropolitan disability policy Randall used to determine Plan eligibility in this case.[19] Following this Court's ruling

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[19] "The standard to be applied will require the claimant to establish a physical inability to follow any occupation from which he can earn a reasonably substantial income rising to the dignity of an income or livelihood..." Torix, supra at 1431.

in Bruch, the Tenth Circuit apparent abandonment of the dignity standard of disability, is another reason to clarify Bruch.

The holdings below are further contrary to other circuit courts' rulings that refuse to acknowledge oral or unilateral modifications of pension plans, present in this case, Rodriguez v. Meba Pension Trust, 872 F.2d 69 (CA4 1989), Straub v. Western Union Telegraph Company, 851 F.2d 1262, 1265 (CA10 1988), or that shift the burden to the administrator, Music, supra.

Given Climax's refusal to give Husman an application for medical retirement, and given Climax's September 30, 1986 termination of the Plan which gave Climax a reversion of over eleven million dollars, the

holding below refused to address the issue of the neutrality of Climax employee Randall, although bad faith was alleged VanBoxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1051 (CA7 1987), Newell v. Prudential Ins. Co. of America, 904 F.2d 644, 651 (CA11 1990), Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1154 (CA9 1986). Should this Court find that Randall's interpretation of "apply for benefits" was a factual determination subject to a different standard of review, the holding below would conflict with Luby v. Teamsters Health, Welfare & Pension Trust Funds, 944 F.2d 1176 (CA3 1991) and Reinking v. Philadelphia American Life Insurance Co., 910 F.2d 1210 (CA4 1990)(de novo standard of review), contra: Pierre v. Connecticut General

Life Insur. Co., 932 F2d 1552 (CA5 1991)(abuse of discretion standard).

Finally, Randall failed to follow the claims procedure of 29 U.S.C. §1133 and 29 C.F.R. §2560.503(1)(f) which afford a participant "a full and fair review", by denying Husman a hearing, and by providing "adequate notice" 29 U.S.C.§1133. See Blau v. Del Monte Corp., 748 F.2d 1348, 1354 (CA9, 1984) cited in Holland v. Burlington Industries, Inc., 772 F.2d 1140, 1149, 1150 (CA4 1985), Wolfe v. J.C.Penney Co., 710 F.2d 388, 393 (CA7 1983) cited in Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 550 (CA6 1989), Sage v. Automation, Inc. Pension Plan & Trust, 845 F.2d 885, 895 (CA10 1988) (prejudice must be shown), Sandoval v. Aetna Life and Cas. Ins. Co., 967 F.2d 377, 380 (CA10

1992) (district court may consider only the arguments and evidence before the administrator at the time it made that decision).

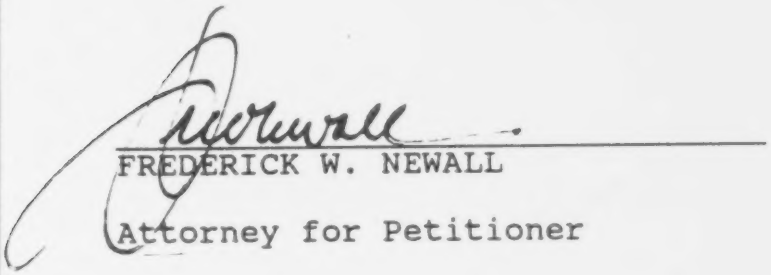
CONCLUSION

This Court should take the opportunity to clarify its holding in Bruch and in light of the conflicts between the circuits and the Tenth Circuit's opinion in this case. There needs to be a clarification of the perimeters of Bruch, and the extent to which an administrator's grant of discretion to set procedures may override the plain terms of the Plan language. Given the standards of review set forth in Bruch, this Court must grant certiorari in this case and reverse the Tenth Circuit's ruling

that Randall acted reasonably. Restricting or denying such fundamental ERISA rights as an application or a hearing should not go unanswered here.

DATED: September 3, 1993.

Respectfully submitted,



FREDERICK W. NEWALL

Attorney for Petitioner

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 92-1297
(D.C. No. 89-M-2104)
(D.Colo.)

CONRAD JOHN HUSMAN,

Plaintiff-Appellant,

v.

CLIMAX MOLYBDENUM COMPANY, a Delaware corporation; CLIMAX NON-CONTRIBUTORY RETIREMENT INCOME PLAN, BARBARA RANDALL, Administrator,

Defendant-Appellee.

ORDER AND JUDGMENT[1]

Before TACHA, BALDOCK and KELLY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined

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[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Conrad John Husman is a retired employee of the Climax Molybdenum Company ("Climax"). Mr. Husman has been permanently disabled since 1977. Husman appeals an order of the United States District Court for the District of Colorado granting Climax's motion for summary judgment in Husman's ERISA action under 29 U.S.C. §1132(a)(1)(B) for disability payments retroactive to his 1977 injury. We affirm.

We review a grant of summary judgment de novo, applying the same standards used by the district court. See Lucas v. Mountain States Tel & Tel., 909 F.2d 419, 420 (10th Cir.1990). Because the benefit plan grants to its administrator discretionary authority to determine eligibility for benefits, the

plan administrator's decision must be upheld unless it is "(1) arbitrary and capricious, (2) not supported by substantial evidence, or (3) erroneous on a question of law." Pratt v. Petroleum Prod. Management, Inc. Employee Savs. Plan & Trust, 920 F.2d 651, 657 (10th Cir. 1990) (internal quotation omitted).

Although Husman has been disabled since 1977, the plan administrator, Barbara Randall, granted his request for disability retirement benefits retroactive only to October, 1986. Randall based that determination on her reading of the pension plan, which makes application for benefits a condition precedent to eligibility for those benefits. Husman did not apply for these benefits until April, 1986. Randall selected October, 1986 as the effective date of the eligibility because it is the date upon which Husman became eligible for Climax's disability insurance benefits

through their disability insurer, Metropolitan Life Insurance Company. We find Randall's administration of the plan to be reasonable, and **AFFIRM** for substantially the reasons given by the district court. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-2104

CONRAD JOHN HUSMAN,

Plaintiff,

v.

CLIMAX MOLYBDENUM COMPANY, a Delaware corporation, CLIMAX NON-CONTRIBUTORY RETIREMENT INCOME PLAN, BARBARA RANDALL, Administrator,

Defendants.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This is an action under ERISA, 29 U.S.C. §1132(a)(1)(B) by a participant in a qualified pension plan seeking payment of disability retirement benefits retroactively to a date nine years before the filing of an application for those benefits. The defendants have moved for a summary judgment of dismissal. There has been full discovery in the case and oral argument on the motion.

A stipulated pretrial order was entered

by Magistrate Richard B. Harvey on October 4, 1990. The factual stipulations contained in that pretrial order are incorporated by this reference.

The plaintiff began employment with Climax on March 28, 1962. He last worked on April 28, 1977, when he sustained an injury on the job. Husman was terminated from his employment at the expiration of his medical layoff on April 24, 1981. Throughout his employment, the plaintiff was member of the union with which Climax had a series of collective bargaining agreements applicable to Husman during his employment. In April, 1986, the plaintiff submitted completed applications for total and permanent disability benefits to Climax. The form used for that purpose is a claim form from Metropolitan Life Insurance Company, the company providing total and permanent disability benefits under a life insurance policy. Metropolitan received the

plaintiff's application for total and permanent disability benefits from Climax on October 30, 1986. On September 10, 1987, Metropolitan approved the payment of those benefits retroactively to the date of receipt of the application, October 30, 1986. Barbara Randall, the plan administrator, determined that Husman was entitled to disability retirement benefits by a letter to him, dated October 5, 1987, and requested that he complete a request for payment information form. The defendants' position is that the disability retirement benefits under the pension plan should begin October 30, 1986, the same date used by Metropolitan for disability benefits under the insurance policy.

The plaintiff asserts that the disability retirement benefits should begin at the time that he was injured in 1977. For purposes of the present motion, the defendants concede that the plaintiff was

disabled within the meaning of the 1980 pension plan and all predecessor plans as early as 1977. Therefore, the question presented is limited to whether the plan administrator acted unreasonably in limiting the disability retirement benefits to the filing of the application for those benefits jointly with the application for the total disability benefits under the Metropolitan insurance policy.

The parties are agreed that the standard of review is whether the plan administrator's determination was arbitrary and unreasonable. The pension plan in effect at the time of the termination of the plaintiff's employment is the supplemental agreement amended and restated as of July 15, 1980, a copy of which is Exhibit A to the defendants' motion for summary judgment. Under Article VIII, eligibility for disability retirement is established under Section 5. The amount of such retirement

benefits shall be calculated in accordance with Article IX, Section 4. Article XII, Section 2(a) reads as follows:

> Disability Retirement Benefits shall be payable to en eligible member, who has applied therefore, commencing as of the first day of the month after a determination of his Total and Permanent Disability has been made by the Administrator, as provided by this Article and Article VII, Section 5, and shall be payable as of the first day of each month thereafter during the life of such Member, and, if applicable, his spouse, except as otherwise provided under Subsection (b) below; provided, however, that no Benefit shall be payable in respect of a period in which such Member is in receipt of Weekly Accident and Sickness Insurance benefits under the Group Insurance Program.

The practice followed by Ms. Randall,

as plan administrator of the pension plan, was to accept the determination of Metropolitan Life Insurance Company concerning disability since the definitions of disability under the insurance policy and the retirement plan are considered to be the same. Thus, she simply followed the action of Metropolitan in determining that Mr. Husman was eligible on October 30, 1986.

The plaintiff's claims of unreasonableness are, in essence, that the plaintiff should be awarded retirement benefits when he first became disabled, regardless of the timing of his application. Although, at first blush, that contention seems frivolous, the plaintiff points out that in December, 1979, an arbitrator on a labor grievance ruled that the plaintiff was not able to work and was entitled to be placed on a medical layoff status with 52 weeks of accident and sickness benefits to begin as of May 3, 1977. Additionally, an

administrative law judge of the Social Security Administration found the plaintiff disabled within the meaning of the Social Security Act as of April 29, 1977, and a Colorado State Workman's Compensation Hearing Officer found the plaintiff to be temporarily totally disabled as of June 22, 1983. Thus, these disability determinations should have been known to the defendants. The plaintiff confuses the issue. As previously stated, the defendants admit on this motion that the plaintiff was disabled within the meaning of the plan as early as April, 1977. The refusal to grant benefits retroactively to that date is rooted in the determination that an application for such benefits is a necessary condition to their receipt under the language quoted above. That is a reasonable interpretation of the plan.

The plaintiff also asserts that the plan administrator was unreasonable in

denying the plaintiff a hearing. Again, what purpose would be served by such a hearing? The facts concerning the timing of the application are admitted. The reason for the provision for a hearing under the plan is a determination of disability but that is irrelevant in this case.

The plaintiff also contends that his rights vested under earlier versions of the pension plan which had different language relating to a definition of disability. In this Court's view, there is no meaningful difference in the changes in language and the same result would obtain even if the plan administrator used an earlier version of the pension plan.

Finally, the plaintiff contends that the plan administrator has acted improperly in delegating the determination of disability benefits to Metropolitan Life Insurance Company. The eligibility for benefits under the insurance policy and the

pension plan are substantially the same and in this Court's view the practice of using the same application for both types of benefits is a reasonable administrative decision.

For these stated reasons, it is this Court's view that the plaintiff has failed to show that the defendants have acted unreasonably in determining that his disability retirement benefits should begin as of the date that his application for such benefits was filed with Metropolitan Life Insurance Company.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted and the plaintiff's claims are dismissed with prejudice. The Clerk shall enter judgment accordingly.

Dated: August 14, 1992.

BY THE COURT:

Richard P. Matsch, Judge

§1132 Provides as follows:

Civil enforcement
Persons empowered to bring a civil action.

A civil action may be brought -
(1) by a participant or beneficiary -
   (A) for the relief provided for in subsection (c) of this section, or
   (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. §1133 provides as follows:

Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall:
(1) Provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
(2) Afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 C.F.R. §2560.503(1)(f) provides as follows:

Content of notice. A plan administrator or, if paragraph (c) of this section is

applicable, the insurance company, insurance service, or other similar organization, shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant:

(1) The specific reason or reasons for the denial;
(2) Specific reference to pertinent plan provisions on which the denial is based;
(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and
(4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

29 U.S.C. §1104 provides as follows:

FIDUCIARY DUTIES

(a) Prudent man standard of care.
(1) Subject to sections 403(c) and (d) [29 USCS §1103(c) and (d)], 4042 [29 USCS §1342], and 4044 [29 USCS §1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

xxx

(d) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title of title IV.

ROBERT S. YOUNG II M.D., P.C.
ORTHOPEDIC SURGERY
1925 EAST ORMAN AVENUE SUITE 328
PUEBLO, COLORADO 81004

(719) 561-0703

November 30, 1984

Frederick W. Newall
Attorney at Law
The Barrister Building
323 S. Nevada Avenue
Colorado Springs, CO 80903

Re: Conrad John Husman

Dear Mr. Newall:

Mr. John Husman's chart was reviewed in respect to his complaints of his prolonged back pain.

He was first seen by me in December, 1978 with complaints of low back pain and a history of injuries to the low back while working at the Climax Molybdenum Mine. He has been seen by me on many occasions over the past five years. During this period of time his complaints have been mainly that of low back pain with some pain into his legs but normal neurological exams.

Because of the continued complaints, a lumbar myelogram was done on November 24, 1980 which showed a posterior bulge or displacement at the L5 level. He was also noted to have some narrowing of the L5, S1 disc space.

Mr. Husman's complaints of back pain have continued and have been present at the time of each office visit. Because they continued over a long period of time, a lumbar myelogram was repeated on June 23, 1983 and showed a "significant posterior disc protrusion. L5, S1 has extended both superiorly and inferiorly from the posterior margin of the disc space producing some attenuation of the S1 nerve root sheaths bilaterally."

The radiologist further states that the posterior displacement of the thecal sac, (sac within which the nerves and spinal cord are contained), has increased since the previous myelogram in November of 1980.

It is my feeling that Mr. Husman had an early disc problem which had not fully developed into a herniated disc in November of 1980 but was in the process of rupturing. This process will cause pain due to irritation of the annulus fibrosis around the disc but may not produce neurological signs.

On the myelogram of June 23, 1983, it is obvious that he has a frankly ruptured disc. His pain has gradually increased over this period of time that I have been seeing him. I do not feel that he is able to do any type of work at this time because of his back problem. He has pain while sitting or standing. Bending, lifting and walking also cause pain. The position of most comfort is lying down.

Mr. Husman also has pain in this right knee which has been present since a cartilage injury some years ago. He had a medial meniscectomy done in Denver in 1973. X-rays show narrowing of the medial joint space with degenerative arthritic changes.

He also has sub-patellar crepitus, (grinding). His knee is more painful with prolonged walking as well as squatting or trying to climb ladders or stairs.

Again, I do not feel that he is going to do any type of useful work because of the combination of his knee and back pain.

Sincerely,

Robert S. Young II, M.D.

RSY:bg

ARTICLE II

Definitions

1. "Employee" means any person who, during the term of this Agreement, is employed by the Company or has seniority status with the Company at its operations at Climax, Colorado, and is represented by the Union in the bargaining unit which is defined in the collective bargaining agreement between the Company and the Union as amended from time to time.

2. "Member" means any person included in the membership of the Plan as provided in Article VI.

3. "Board of Directors" means the Board of Directors of AMAX Inc.

4. "Fund" means the Retirement Income Fund established by payments made by the

Company, in accordance with Article IV of this Agreement, which may be either a trust fund or a deposit administration fund, or both.

5. "Trust Agreement" means an agreement entered into with a trustee or insurance company, or both, in accordance with Article V of this Agreement.

6. "Trustee" means a bank, trust company, or insurance company, or any combination of the three, designated in accordance with Article V of this Agreement to hold and invest the Fund and to pay benefits and expenses as authorized by the Administrator of the Plan.

7. "Effective Date" means November 1, 1958, and "Anniversary Date" means each

December 31 after the Effective Date.

8. "Contribution Date" means each January 1 after the Effective Date.

9. "Total and Permanent Disability" means a physical or mental condition, as determined in accordance with Article XII, Section 2(c), which permanently prevents the Employee from engaging in any regular employment with the Company or in any other regular gainful occupation, except such employment as is found to be for the purpose of rehabilitation or not incompatible with the finding of Total and Permanent Disability. "Totally and Permanently Disabled" means any Member who suffers a Total and Permanent Disability. The term shall exclude, however, for the purposes of the Plan, any such disability resulting, after the

Effective Date, from service in the armed forces of any country for which a service-connected government disability pension is payable; from self-inflicted willful injury, or from criminal activity which results in conviction.

10. "Actuary" means a member of the American Academy of Actuaries who is also an Enrolled Actuary as set forth under government regulations, or an insurance company or firm of actuaries, at least one of whose members or employees is a member of the American Academy of Actuaries and an Enrolled Actuary.

11. The masculine pronoun, wherever used, shall also include the feminine pronoun.

12. "Retirement" means the severance of employment with the Company with eligibility for immediate of deferred pension.

13. "Continuous Service" means service recognized for purposes of determining eligibility for membership in the Plan, determined as provided in Section I of Article VII.

14. "Eligible Service" means service recognized for purposes of determining eligibility for benefits under the Plan, determined as provided in Section 2 of Article VII.

15. "Credited Service" means service recognized for purposes of computing the amount of any benefit under the Plan, determined as provided in Section 3 of Article VII.

16. "Benefit" means monthly payments under the Plan payable as provided in Article XII.

17. "Actuarial Equivalent" means a benefit of equivalent value to the benefit it replaces when computed on the basis of the mortality tables and interest rates used in administering the Plan.

18. "Affiliated Company" shall mean any company which is a component member of a controlled group of corporations within the meaning of Section 1563(a) of the Internal Revenue Code, determined without regard to Section 1563(a)(4) and (e)(3)(C) thereof, which controlled group of corporations includes as a component member AMAX, Inc., except that "50 per cent" shall be substituted for "80 per cent" where

it appears in Section 1563(a) of the Internal Revenue Code.

19. "Employee Benefits Portfolio Review Committee" means the committee appointed from time to time by the Board of Directors which shall have the authority, powers and responsibilities delegated and allocated to it by resolutions of the Board of Directors, including the authority to appoint investment managers who qualify as such under the terms of the Employee Retirement Income Security Act of 1974.

20. "Group Insurance Program" means the portion of the AMAX Group Insurance Plan which applies to Employees as herein defined, which includes Life Insurance, Monthly Total and Permanent Disability Benefits, Accidental Death and Dismemberment Insurance, Weekly

Accident and Sickness Insurance and Extended Non-Total Disability Benefits.

ARTICLE III

Administration of the Plan

1. The Plan shall be administered by an individual (hereinafter called the "Administrator") appointed by the Company who shall serve without compensation from the Fund and who shall be empowered to retain counsel, employ agents and employ the services of clerical or other office personnel, as he may require in carrying out the provisions of the Plan, provided such services are also without compensation from the Fund. Said Administrator shall administer this Plan in accordance with the applicable

provisions thereof, and his authority with regard to interpretation of said provisions shall be final and binding on the parties hereto.

2. The Company shall promptly notify the Union in writing of the appointment of the Administrator of the Plan, and shall promptly notify the Union in writing in the event such appointment is rescinded and some other Administrator is appointed.

3. The Administrator shall have such powers only as are specifically provided herein, including the following:

(a) To prescribe procedures to be followed by Members in filing application for benefits and for furnishing of evidence necessary to establish Members' rights to

such benefits;

(b) To make determinations as to the rights established by the Plan of any Member applying for or receiving benefits because of retirement or permanent and total disability, and to afford any such Member dissatisfied with any such determination the right to a hearing thereon before the Administrator;

(c) To develop procedures for the establishment of Credited Service, as prescribed by the Plan, of Members; and after affording Members an opportunity to make objection with respect thereto, to establish such Credited Service conclusively in advance of retirement;

(d) To obtain from the Company, the Union, the Trustee, the Actuary,

and from the Members such information as shall be necessary for proper administration of the benefit provisions of the Plan;

(e) To prepare an annual statement of the aggregate assets, receipts and disbursements of the Fund and a report on the funding status of the Plan. Such annual report shall be prepared as quickly as practicable after January 1 of each year, and shall be made available to the Union and to such agencies of federal, state or local governments as may now or subsequently be required;

(f) To authorize the Trustee to pay benefits from the Trust Fund in accordance with the Plan, and to establish necessary procedures therefor;

(g) To approve and distribute in such

manner as the Administrator determines appropriate information explaining the Plan; and

(h) To furnish the Company and the Union, upon request, such reports as are reasonable and appropriate.

4. The Administrator shall use that degree of care, skill, prudence, and diligence that a prudent man acting in a like capacity and familiar with such matters would use in his conduct of a similar situation.

ARTICLE VIII

Eligibility

1. Normal Retirement

A member who (i) upon attaining age sixty (60), has accumulated ten (10) years or more of Eligible Service, or whose Eligible Service plus the number of years and parts thereof of retained participation in the said Group Annuity Contract totals ten (10) or more years, or (ii) upon attaining age sixty-five(65), whichever shall occur earlier, and, in either case, retires from the employment of the Company, shall be eligible for a Normal Retirement Benefit, as provided in Article IX, Section 1, of this Plan.

2. A Member shall automatically be severed from employment with the Company on the first day of the month following attainment of age seventy (70), unless such mandatory retirement age is prohibited by applicable law.

3. Early Retirement

A Member with ten (10) years or more of Eligible Service whose employment with the Company is terminated when, or after, he reaches the age of fifty (50), but prior to attainment of age sixty (60), shall be eligible, at his option, for either a Deferred Early Retirement Benefit or an Immediate Early Retirement Benefit, as provided in Article IX, Section 2, of this Plan.

4. Thirty Year Retirement

Effective July 15, 1977, a Member with thirty (30) years or more of Eligible Service whose employment with the Company is terminated prior to attainment of age sixty (60), shall be eligible, at his option, for a Thirty Year Retirement Benefit as provided in

Article IX, Section 3, of this Plan.

5. Disability Retirement

A Member with ten (10) years or more of Eligible Service who becomes Totally and Permanently Disabled at or after attainment of age thirty-five (35), but prior to attainment of age sixty (60), shall be eligible for a Disability Retirement Benefit, as provided in Article IX, Section 4, of this Plan. Such eligibility shall be subject to authentication by examination of one or more physicians at the Climax Hospital or such other examination, at Company expense, as the Company may deem necessary. In the event of continuing doubt as to such eligibility, such Member will be examined by physicians associated with a Denver, Colorado hospital to be selected by mutual

agreement of the Company and the Union, the expense of such examination to be paid from the Fund. Continuation of such eligibility shall be dependent upon findings of physicians of the Company's choice at periodic examinations.

6. Vesting

A Member with ten (10) years or more of Eligible Service, whose employment with the Company is terminated prior to the attainment of age fifty (50) shall be eligible, upon timely application therefor, as provided in Article XII, Section 1, of this Plan, for a Vested Deferred Retirement Benefit as, provided in Article IX, Section 5, of this Plan.

ARTICLE IX

Retirement Benefits

1. Normal Retirement Benefits

Prior to adjustment in accordance with Section 6 of this Article IX, Members who retire on or after July 15, 1980, may apply for a Normal Retirement Benefit to be paid monthly for life equal to:

(i) Sixteen Dollars ($16.00) on or after August 1, 1980, but prior to August 1, 1981,

(ii) Seventeen Dollars and Fifty Cents ($17.50) on or after August 1, 1981, but prior to August 1, 1982, and

(III) Nineteen Dollars and Fifty Cents ($19.50) on or after August 1, 1982,

multiplied by the applicable years and

fractions thereof of Credited Service, including Credited Service arising out of special past service.

2. Early Retirement Benefits

(a) Deferred Early Retirement Benefit. The monthly Deferred Early Retirement Benefit payable upon application upon attainment of age sixty (60) of an eligible Member on or after July 15, 1980, shall be computed in accordance with Section 1 of this Article IX based on his Credited Service at the time of his early retirement.

(b) Immediate Early Retirement Benefit. The monthly Immediate Early Retirement Benefit payable beginning with the first month after an eligible Member makes application on or after July 15,

1980, shall be computed in accordance with Section 1 of this Article IX based on his Credited Service at the time of early retirement, but reduced actuarially for each calendar month by which such member is under the age of sixty (60) at the time of the first such payment.

3. Thirty Year Retirement Benefits.

Effective July 15, 1980, the monthly Thirty Year Retirement Benefit payable beginning with the first month after an eligible Member makes application shall be computed in accordance with Section 1 of this Article IX based on his Credited Service at the time of his retirement.

4. Disability Retirement Benefits

(a) Prior to adjustment in accordance with Section 65 of this Article IX, the monthly retirement benefit from the Fund of a Member becoming eligible on or after July 15, 1980, for a Disability Retirement Benefit, shall be:

(i) Sixteen Dollars ($16.00) on or after August 1, 1980, but prior to August 1, 1981,

(ii) Seventeen Dollars and Fifty Cents ($17.50) on or after August 1, 1981, but prior to August 1, 1982, and

(III) Nineteen Dollars and Fifty Cents ($19.50) on or after August 1,1982,

multiplied by the sum of (1) his years of Credited Service and fractions thereof standing to his credit as of the date he becomes

Totally and Permanently Disabled, plus (2) the amount of Credited Service and fractions thereof which he would be able to earn from the date he becomes Totally and Permanently Disabled to his sixtieth (60th) birthday, assuming full-time employment during that period.

(b) The Disability Retirement Benefits payable to any Member shall be reduced by the amount of any Workmen's Compensation benefits (except fixed statutory payment for the loss of any bodily member) payable to him with respect to his disability; provided that deduction for all such benefits shall be made only with respect to the period in which such benefits (1) are actually paid to such Member, and (2) have not been

deducted from a disability insurance benefit payable to him under the Federal Insurance Contributions Act, as now in effect or hereafter amended. In the case of lump sum settlements under the Workmen's Compensation Act, the lump sum shall be divided by the weekly payment to which he was entitled under Workmen's Compensation in order to determine the period with respect to which Workmen's Compensation benefits are payable for the purpose of this Section 4.

(c) The Disability Retirement Benefits payable to any member shall likewise be reduced by the amount of any statutory disability benefits other than Workmen's Compensation, payable to such Member by reason of any law of the

State of Colorado which may now pertain or which may hereafter be enacted, provided the deduction for any such benefit shall be only to the extent that such benefits have been provided by premiums, taxes or other payments paid by or at the expense of the Company.

(d) The Disability Retirement Benefits payable to any Member shall likewise be reduced by any amounts paid under the Extended Non-Total Disability Benefit portion of the Group Insurance Program as a result of the same disability.

5. Vested Deferred Retirement Benefits

The monthly retirement benefit of a Member becoming eligible on or after July 15, 1980, for a Vested Deferred Retirement Benefit payable at age sixty

(60) shall be computed in accordance with Section 1 of this Article IX based on his Credited Service and benefit formula in effect at the time of termination of employment. A Member who becomes entitled on or after January 1, 1976, to a Vested Deferred Retirement Benefit commencing on the first day of the month next following the date of application in a reduced amount determined in accordance with Section 2(b) of this Article IX.

6. Optional Benefits

(a) The Benefit payable to a Member who retires under Sections 1, 2, 3 or 4 of this Article IX subsequent to January 1, 1976, or who terminates service on or after January 1, 1976, and is entitled to receive a Vested Deferred

Retirement Benefit pursuant to Section 5 of this Article IX shall, unless he elects otherwise, be the actuarial equivalent of the Benefit computed in accordance with Sections 1, 2, 3, 4 or 5 of this Article IX, as the case may be, and shall be payable during the retired Member's life, with the provision that after his death a Benefit at one-half the rate of the Benefit payable to the retired Member shall be paid during the life of, and to, his spouse, provided the spouse shall have been married to the retired Member on the date on which benefit payments to the retired Member commence. The spouse shall not be entitled to receive a Benefit unless the Member's death occurs after receiving his first Benefit

payment.

ARTICLE XII

Commencement and Duration of Benefits

1. Age Retirement Benefits.

(a) Normal, Optional, Immediate Early and Thirty Year Retirement Benefits shall be payable to a Member commencing as of the first day of the month after he becomes eligible for such benefits, but not prior to the effective date, nor prior to the date proper application therefor is received by the Administrator, and shall be payable on the first day of each month thereafter during the life of such Member and, if applicable, his spouse unless such Member has

made an effective election of an optional form of benefit payment under Section 6 of Article IX.

(b) Deferred Early Retirement Benefits shall be payable to an eligible Member, commencing as of the first day of the month after he attains the age of sixty (60), but not prior to the date proper application therefor is received by the Administrator, and shall be payable on the first day of each month thereafter during the life of such Member and, if applicable, his spouse, unless such Member has made an effective election of an optional form of benefit payment under Section 6 of Article IX.

(c) Vested Deferred Retirement Benefits shall be payable to an

eligible former Member, commencing as of the first day of the month after such former Member attains age sixty (60), unless he elects earlier payment in accordance with Section 5 or Article IX, but not prior to the date proper application therefor is received by the Administrator, and shall be payable on the first day of each month thereafter during the life of the former Member and, if applicable, his spouse, ceasing with last payment prior to death.

2. Disability Retirement Benefits

(a) Disability Retirement Benefits shall be payable to an eligible Member, who has applied therefor, commencing as of the first day of the month after a determination of

his Total and Permanent Disability has been made by the Administrator, as provided by this Article and Article VIII, Section 5, and shall be payable as of the first day of each month thereafter during the life of such Member, and, if applicable, his spouse, except as otherwise provided under Subsection (b) below; provided, however, that no Benefit shall be payable in respect of a period in which such Member is in receipt of Weekly Accident and Sickness Insurance benefits under the Group Insurance Program.

(b) Disability Retirement Benefits shall be terminated:

(1) If the Member engages in any regular gainful occupation or employment for remuneration

or profit (except for the purposes of rehabilitation approved by the Administrator, or under circumstances determined by the Administrator to be compatible with the finding of Total and Permanent Disability); or

(2) If the Administrator determines on the basis of a medical examination that the Member has sufficiently recovered to return to any regular work for the Company and the Member refuses an offer of employment by the Company; or

(3) If the Member refuses to undergo a medical examination ordered by the Administrator, provided that the Member may

not be required to undergo a medical examination more often than semi-annually; or

(4) Upon the Member attaining age sixty (60), at which time, commencing with the first day of the month following the month in which he attains such age, he shall receive a Normal Retirement Benefit equal to the Disability Retirement Benefit which he was receiving.

(c) In any case where the Administrator has been requested to make a determination with respect to the Total and Permanent Disability of a Member, the Member first shall be required to submit to examination by one or more physicians at the Climax Hospital. The Administrator may substitute

other equally conclusive diagnostic medical evidence, if he so decides, in place of such examination at the hospital. The fees and expenses of any examination ordered by the Administrator hereunder shall by paid by the Company.

CLIMAX MOLYBDENUM COMPANY

MESSAGE

TO: Mr. Conrad Husman

DATE: February 17, 1977

Your recent Metropolitan sickness claim has been denied for your illness beginning January 27, 1977. Our records indicate you have been on Workman's Compensation since January 13, 1977. Even though the nature of illness is different than your occupational injury, we do not accept any claims while you are receiving other compensation.

BY: Carolyn M. Forschar, Benefits Coordinator

AMAX

March 6, 1981

W.F. Schoeberlein, Esq.
Sherman and Howard
2900 First of Denver Plaza
633 Seventeenth Street
Denver, Colorado 80202

Dear Bill:

Enclosed for your review and comments, if any, are revised pages 3, 5, 22, 24, 25, 32, 36 and 37 to the Climax Non-Contributory Retirement Income Plan between Climax Molybdenum Company and the Oil, Chemical and Atomic Workers - a first draft of which was sent to you with my letter of December 3.

The revisions are made pursuant to a request received in the Employee Benefits Department on February 4, 1981 that we alter the language to provide for the incorporation of a Plan change which would reduce the Plan Total and Permanent Disability Retirement Benefits by any benefits received under the Extended Non-Total Disability Benefit portion of the Climax Group Insurance Program. You will recall that this was suggested in the event of an employee receiving benefits under the extended Non-Total Disability Benefits Program for a disability which is subsequently determined to have been a total and permanent one.

As part of this change, we have clarified the definitions in the Plan concerning the references to the Weekly Sickness and Accident Insurance portion of

the Group Insurance Program and the use of the term Total and Permanent Disability. To clarify the Plan additionally we have used a new title for the pre-retirement spouse's benefit and changed the effective date of the pre-retirement spouse's benefit to January 1, 1980 as requested.

One copy of the revised pages has been underlined to indicate the changes. They should be inserted in the previous draft and submitted to the union for ratification. When this latest draft is accepted and signed, we will proceed with the preparation of the explanatory booklets, examples or other explanatory material illustrating the new Plan.

In discussing these changes with the Union the question will come up as to what you do in the situation where an employee has received Non-Total Disability Benefits which are subsequently called Total Disability Benefits and who is not eligible for a disability pension against which to offset the payments. In this case you will either have to attempt to recover the Non-Total Benefits or write them off. Since the circumstance we are dealing with is very unlikely to occur, I don't think this is much of a risk.

Sincerely,

David Neill

DN:meb
Enclosures

Climax Molybdenum Company
A Division of
AMAX, Inc.

October 5, 1987

Mr. Conrad J. Husman
P.O. Box 851
Pueblo, CO 81002

Dear Mr. Husman:

We have received word that your total and permanent disability claim with Metropolitan Life Insurance Company has been approved effective October, 1986. Enclosed is Metropolitan Life Insurance Company's check in the amount of $2,808.00 which represents your total and permanent disability payments for the months of October, 1986 through September, 1987.

You will receive a maximum of sixty (60) payments. All future checks will be sent directly from the insurance company.

You will continue to receive these disability payments for as long as you are unable to engage in any gainful occupation or employment up to the maximum of sixty (60) months.

Please complete the enclosed "Request for Payment Information" form. Once we have received this completed form, we will calculate your disability retirement benefits and send you all necessary information and forms to be completed by you in order to commence your retirement.

If you have any question, please contact the benefits office.

Very Truly Yours,

Barbara Randall
Industrial Relations
Administrator

/br

Enclosures

Climax Molybdenum Company
A Division of
AMAX, Inc.

August 21, 1989

Law Offices of Frederick Newall
Attn: Mr. Frederick W. Newall
730 N. Weber, Suite 101
Colorado Springs, CO 80903

Dear Mr. Newall:

First, you must realize that we will be discussing two different plan benefits concerning Conrad Husman which includes the Non-Contributory Retirement Income Plan and the Total and Permanent Disability Benefit (see attached F.W. Newall letter dated October 19, 1987).

When Conrad Husman submitted his Total and Permanent Disability Statement of Claims (4/11/86 and 4/22/86), they were forwarded to the Metropolitan Life Insurance Company. Metropolitan concluded that Conrad Husman was entitled to T&P Disability benefits retroactive to October, 1986. Since the T&P claim was not filed until the year 1986, Metropolitan does not back up and pay to when Mr. Husman first became disabled (1977) but begins paying six months from the date of when the claim was filed or received. This is consistent with the administration of the Group Insurance Program.

The money that Mr. Husman received on October 5, 1987, in the amount of $2,808.00 represents the life insurance in effect during 1977 when Conrad Husman was last working here at the Climax mine. The value of that group policy was $13,000.00. Total

and Permanent Disability Payments are paid for sixty months ($13,000.00 - 60 months + interest = $234.00 per month). The $2,808.00 represents payments from the date of approval, October, 1986 through September, 1987 ($234.00 x 12 months = $2,808.00). These T&P Disability payments will be paid at $234.00 per month until September, 1991.

Please note that I am **NOT** the Plan Administrator for this Plan. My responsibilities only include the completion of the employer section on the "Statement of Claim for T&P Disability Benefits" and filing of such claim with the Metropolitan Life Insurance Company. The Disability Claims Section of Metropolitan determines if indeed such a claim is eligible for T&P Disability benefits.

Now let's discuss the Disability Retirement of which I **AM** the Plan Administrator. Since Metropolitan Life Insurance Company approved Conrad Husman's T&P Disability claim, Mr. Husman is entitled to a Disability Retirement from the Non-Contributory Retirement Income Plan. Mr. Husman's years of service are figured as if he had been actively employed from March 28, 1962 through March 21, 1998 (60th birthday) which gives Conrad Husman a total of 36.2 years. It has always been the practice of the Climax Mine to use the date of notification from the Metropolitan Life Insurance Company to determine when Total and Permanent Disability Retirement benefits begin which in this particular case will be retroactive to October, 1986.

Under the Disability Retirement Income Plan, Conrad Husman may elect one of two options - Optional Form of Benefit, Life Annuity or Normal Form of Payment, Married. Those

approximate amounts are - Life Annuity Option payable for life only at $742.00 per month or Married Option payable at $582.00 per month and at his death a spouse option payable at $290.00 per month for the life of the spouse.

I have sent Conrad Husman two separate "Request for Payment Information" (October 5, 1987 and May 24, 1989) and as of this date have not heard one word from Mr. Husman. Until I receive this request containing the needed information, I cannot make an exact dollar calculation nor can I start Mr. Husman's Disability Retirement benefits.

As quoted from your letter dated April 13, 1988 (attached), you stated "Please be advised that your refusal to discuss this matter and to resolve it will lead my client to seek whatever remedies he has in a Court of Law". Please be advised that I have not refused to discuss this with Mr. Husman or yourself. I think the matter lies in the fact you and Mr. Husman cannot comprehend that the T&P Disability Benefit and the Disability Retirement are two different payments by two different accounts as stated in my letters of October 5, 1987, May 24, 1989, and the OCAW Grievance (all of which are attached) and several telephone conversations with you during late 1987 and early 1988.

I believe this adequately answers all of your questions concerning Conrad Husman and his benefits through the Climax Mine.

Very Truly Yours,

Barbara A. Randall
Industrial Relations Administrator

LAW OFFICES OF FREDERICK W. NEWALL
730 N. WEBER SUITE 101
COLORADO SPRINGS, CO 80903
(719) 633-5211

October 19, 1987

Climas Molybdenum Co.
Barbara Randall
Industrial Relations Administrator
Climax, CO 80429

Re: Conrad J. Husman

Dear Ms. Randall:

Mr. Husman is in receipt of both your "Request for Payment Information" form and a check from Metropolitan Insurance Company in the amount of $2808.00.

Would you be so kind as to give Mr. Husman a break-down as to why the onset of disability is set at October, 1986 when he left Climax's employ in a disabled condition in 1977?

Mr. Husman filed whatever protest and grievance are applicable as to the determination he was permanently disabled only beginning in 1986.

Also, it would help in Mr. Husman's mind in choosing a particular payment schedule if you would provide a break-down of the calculations to arrive at the $2808.00 figure.

If you have any questions, please do not hesitate contacting me at the above office.

Sincerely,

Frederick W. Newall

FWN/md

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

Conrad John Husman,

Petitioner,

vs.

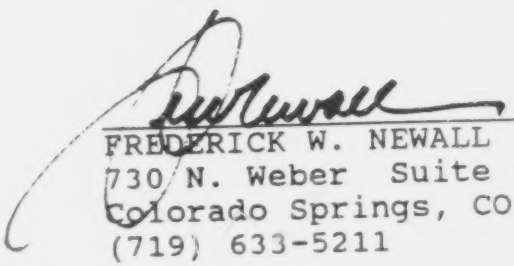
CLIMAX MOLYBDENUM COMPANY,
a Delaware corporation,
CLIMAX NON-CONTRIBUTORY
RETIREMENT INCOME PLAN,
BARBARA RANDALL,
Administrator,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari were deposited in the U.S. mail, first class postage prepaid and affixed thereto, this 4th day of September, 1993, to the following:

Walter V. Siebert, Esq.
Sherman & Howard
633 Seventeenth Street
Suite 3000
Denver, CO 80202



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Attorney for Petitioner

Supreme Court, U.S.
FILED
DEC 10 1993
OFFICE OF THE CLERK

No. 93-814

In The

Supreme Court of the United States

October Term, 1993

CONRAD JOHN HUSMAN,

Petitioner,

v.

CLIMAX MOLYBDENUM COMPANY, a Delaware corporation, CLIMAX NON-CONTRIBUTORY RETIREMENT INCOME PLAN, BARBARA RANDALL, Administrator,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, where a pension plan grants the administrator the discretion to interpret the plan and to prescribe procedures for the filing of applications for disability pension benefits, the plan administrator may make the filing of an application for benefits a prerequisite for receipt of benefits.

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No. 93-814

In The

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October Term, 1993

CONRAD JOHN HUSMAN,

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v.

CLIMAX MOLYBDENUM COMPANY, a Delaware corporation, CLIMAX NON-CONTRIBUTORY RETIREMENT INCOME PLAN, BARBARA RANDALL, Administrator,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

Respondents, Climax Molybdenum Company[1] (the "Company") and Climax Non-Contributory Retirement Income Plan, Barbara Randall, Administrator, submit this brief in opposition to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and request that this Court deny certiorari to review the decision of the Court of Appeals affirming

[1] All parties to the proceeding are listed in the caption. Climax Molybdenum Company is a wholly owned subsidiary of AMAX, Inc.

the award of summary judgment to Respondents by the United States District Court for the District of Colorado.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner commenced his action in the U.S. District Court for the District of Colorado on December 7, 1989, by the filing of a complaint seeking retroactive retirement benefits pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Respondents filed a Motion to Dismiss and for Summary Judgment and a brief in support of their motion. On August 14, 1992, the District Court entered its Order granting Respondents' Motion (Pet. App. B). On October 1, 1992, Petitioner filed a notice of appeal of the District Court's orders to the United States Court of Appeals for the Tenth Circuit. On June 8, 1993, the Court of Appeals entered its order and judgment affirming the decision of the District Court (Pet. App. A).[2]

B. Factual Background

Conrad John Husman (the "Petitioner"), was granted disability pension benefits from the Company effective October, 1986 (*see* Pet. App. H at 1), pursuant to Article II

[2] References to the Petition for Writ of Certiorari shall be "Pet." followed by reference to the page number or Appendix, cited as "App."

of the Supplemental Agreement, Climax Non-Contributory Retirement Income Plan between the Company and the Oil, Chemical and Atomic Workers International Union, AFL-CIO, amended and restated as of July 15, 1980 (the "Pension Plan") (Pet. App. E). Petitioner commenced his civil action seeking to recover such pension benefits retroactive to 1977.

Petitioner was initially employed by the Company on March 28, 1962. On April 28, 1977, Petitioner injured his back while at work and thereafter was placed on medical lay-off status. From 1981 through 1986, Petitioner received accident and sickness and non-total disability benefits. Because Petitioner could not return to work, the Company terminated Petitioner's employment on April 24, 1981, at the expiration of the four-year medical layoff. (Pet. App. B at 2).

In April, 1986, Petitioner submitted applications for disability pension benefits. To receive total disability pension benefits under the Pension Plan, Petitioner was required to apply for such benefits. Following application, the Plan Administrator was required to determine whether Petitioner was totally and permanently disabled. (Pet. App. E at 28). The application used to apply for disability pension benefits was the same form used to apply for total disability insurance benefits, which was provided through Metropolitan Life Insurance Company ("Metropolitan"). It was the standard practice of the Company and the Plan to use the date on which Metropolitan determined a Pension Plan participant to have been totally and permanently disabled for insurance

purposes as the date the Pension Plan participant was totally disabled for purposes of receiving disability pension benefits. (Pet. App. B at 2-3).

Metropolitan received Petitioner's application for disability insurance benefits in October, 1986. In October, 1987, Barbara Randall, the Plan Administrator received notice that Metropolitan had determined that Petitioner was totally and permanently disabled as of October, 1986, the date on which Metropolitan had received Petitioner's application. (Pet. App. B at 3). Following this determination, the Plan Administrator sent to Petitioner notice that he was eligible for disability insurance and disability retirement benefits. The Plan Administrator also sent to Petitioner a "Request for Payment Information," a form on which the participant selects one of several payment schedules for his or her benefits. The election made in the "Request for Payment Information" is necessarily used by the Plan Administrator to calculate the amount and duration of the disability retirement benefits to be paid. (Pet. App. H at 1). The Plan Administrator did not receive a response to her Request for Payment Information, and notified Petitioner of that fact on May 24, 1989. On August 21, 1989, the Plan Administrator notified Petitioner that it was the Plan's policy to use the notification from Metropolitan to determine when total and permanent disability retirement payments commenced. (Pet. App. H at 5).

Before the District Court, Petitioner sought to recover disability pension benefits retroactive to April, 1977, before any application for such benefits was submitted. Petitioner asserted that the decision by the Plan Administrator to deny benefits retroactive to April, 1977, was

arbitrary, illegal, capricious, unreasonable, discriminatory and not made in good faith, and that the decision violated various provisions of ERISA. (Pet. App. B at 3-4). In its Memorandum, Opinion and Order, the District Court found that "[t]he refusal to grant benefits retroactively to that date is rooted in the determination that any application for such benefits is a necessary condition to their receipt . . . . That is a reasonable interpretation of the plan." (Pet. App. B at 7).

The District Court also rejected Petitioner's contention that an earlier version of the Pension Plan contained language different from the 1980 Pension Plan concerning the definition of disability. The Court concluded, that "[t]here is no meaningful difference in the changes in language and the same result would obtain even if the Plan Administrator used an earlier version of the pension plan." (*Id.* at 8).[3] Finally, the District Court rejected Petitioner's contention that the Plan Administrator had acted improperly in allegedly delegating the determination of the date of disability to Metropolitan. The Court stated, "[t]he eligibility for benefits under the insurance policy and the pension plan are substantially the same and in this Court's view the practice of using the same application for both types of benefits is a reasonable administrative decision." (*Id.* at 8-9).

On appeal, the Court of Appeals found the Plan Administrator's construction of the Plan, treating submission of an application as a prerequisite for receipt of

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[3] Petitioner has not raised nor briefed this issue in his Petition for Writ of Certiorari.

disability pension benefits, was reasonable. The Court of Appeals adopted the reasoning of the District Court and affirmed the decision of the District Court. (Pet. App. A at 4).

ARGUMENT

A. The Decisions of the Lower Court's Finding the Plan Administrator's Interpretation of the Plan to be Reasonable are Correct.

1. The Plan Administrator Had Discretionary Authority to Interpret the Plan, and Therefore, Her Decision May be Reversed Only if Not Reasonable.

This Court, in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) set forth the applicable standard of judicial review of a denial of benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B). This Court held that a *de novo* standard of review is appropriate for reviewing an employer's denial of benefits, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115.

Article III of the Pension Plan sets forth the authority of the Plan Administrator. It invests the Plan Administrator with discretion to interpret the Plan, stating that the Plan Administrator's "authority with regard to interpretation of said provisions shall be final and binding on the parties hereto." (Pet. App. E, at 8-9). Article III also gives the Plan Administrator power:

> (a) To prescribe procedures to be followed by Members in filing applications for benefits and for furnishing of evidence necessary to establish Members' rights to such benefits; [and]
>
> (b) To make determinations as to the rights established by the Plan of any Member applying for or receiving benefits because of retirement or permanent and total disability . . . .

(Pet. App. E at 9-10).

Because the Pension Plan grants the Plan Administrator discretionary power to interpret the Pension Plan's provisions, the Plan Administrator's decision cannot be disturbed if it is reasonable. *See Richards v. United Mine Workers of Am. Health & Retirement Fund*, 895 F.2d 133 (4th Cir. 1990) (where trustees have "full and final determination say to all issues concerning eligibility for benefits" disability decisions were to be reviewed using an abuse of discretion standard).

Here, the Plan Administrator determined that a member must apply for benefits, that is, submit the form application, before benefits would be paid. In light of the Plan Administrator's authority, granted by the Pension Plan, to set procedures for application and to make determinations of eligibility, that determination should be reviewed only for an abuse of discretion.

2. Making Application for Disability Retirement Benefits Is a Reasonable Prerequisite To Receiving Such Benefits.

Petitioner claims that the Plan Administrator acted arbitrarily, capriciously and unreasonably when she denied Plaintiff total disability benefits retroactive to 1977. The thrust of his claim is that the action by the Plan Administrator, who interpreted the Pension Plan requiring Petitioner to make application for such disability benefits a prerequisite for their commencement, was improper. (Pet. at 32-34). Petitioner's claim lacks a basis either in law or in fact.

Petitioner suggests that he should receive disability pension retroactive to 1977 because he was prevented by the Company or the Plan Administrator from applying for those benefits. This argument is not supported by any evidence in the courts below.

Petitioner received non-total disability benefits through Metropolitan from May 1, 1981 until April, 1986. There is no record evidence that Petitioner ever challenged the determination that he was only partially disabled or that he ever requested or filed an application for total and permanent disability benefits until the time at which the non-total disability payments ceased.[4]

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[4] Petitioner suggests that a 1977 memorandum from Ms. Carolyn Forschar (Pet. App. F), the previous Plan Administrator, denying Petitioner's claims for accident and sickness benefits under the Company's Group Insurance program demonstrates that he was prevented from making an application for disability pension before 1986. (Pet. at 31-32, fn. 15). In fact, the memorandum did not forbid application for accident

Next, Petitioner argues that he should have received disability pension benefits retroactive to 1977 because a grievance he filed in 1977 should be considered an application for total disability pension benefits. Petitioner asserts that the Plan Administrator acted unreasonably in determining that only the application form that Petitioner submitted in 1986 constituted an application. According to Petitioner, the Plan Administrator's definition of "apply" was somehow in conflict with the plain language of the Pension Plan which contained no definition of "apply." This argument is wholly without merit. Article XII 2(a) of the Pension Plan provides, in part: "Disability Retirement Benefits shall be payable to a member, *who has applied therefor* . . . " (Pet. App. E at 28) (emphasis added). Article III of the Pension Plan clearly grants to the Plan Administrator discretionary power "[t]o prescribe procedures to be followed by Members in filing applications for benefits and for furnishing of evidence necessary to establish Members' rights to such benefits." Thus, the Plan Administrator's determination that what was required to apply for Disability Pension Benefits was the submission of an application can only be disturbed if unreasonable. *Firestone*, 489 U.S. at 115. Clearly, where the Pension Plan itself states that benefits are payable only to a member who has applied for them, it is reasonable to

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and sickness nor any other sort of benefits, but merely informed Petitioner that his claim for those benefits could not be granted until he was no longer receiving Workers' Compensation payments. This in no way prevented Petitioner from applying for accident and sickness benefits once his Workers' Compensation payments ceased, nor from applying for Total and Permanent Disability Pension once he became eligible.

require submission of an application as a prerequisite to eligibility for benefits.

Petitioner argues that it was unreasonable for the Plan Administrator to base her determination of disability upon a similar determination by Metropolitan because there was a three month waiting period under the Metropolitan Plan before benefits were payable, but none under the Pension Plan, and the definition of "total and permanent disability" under the Metropolitan Plan was slightly different. (Pet. App. at 30-31). Petitioner once again has failed to focus on the issue before the Court. It was stipulated in the District Court that for purposes of the summary judgment motion, Petitioner had been "totally and permanently disabled" since April 28, 1977. (Pet. App. at 3-4). Because Petitioner's condition was undisputed in the District Court, the standard used to determine whether Petitioner was totally and permanently disabled is irrelevant. Moreover, Petitioner was granted disability pension benefits retroactive to the date his application was received. No waiting period was invoked. Neither of these assertions by Petitioner demonstrates error by the Courts below.[5]

---

[5] Petitioner makes a side argument, apparently attempting to call into question the standard of review employed by the District Court and the Court of Appeals. Petitioner asserts it was error for the District Court not to specifically address the issue of the Plan Administrator's neutrality. (Pet. at 35-36). A fiduciary's possible conflict of interest does not affect the standard of review of its decisions. Rather, possible conflict of interest may be considered as a factor in determining whether there has been an abuse of discretion. *Firestone*, 489 U.S. at 115, *citing* RESTATEMENT (SECOND) OF TRUSTS, § 187, comment d (1959).

B. There is No Conflict Among the Circuits Nor Any Question of Law Unresolved by This Court Relating to Petitioner's Claims that Justifies the Attention of This Court

Petitioner argues that this Court should grant certiorari to "clarify" its holding in *Firestone* as to its application to "administrative procedure of a plan, as opposed to its interpretation." (Pet. at 30). No such clarification is necessary. *Firestone* clearly adopts the position of the RESTATEMENT (SECOND) OF TRUSTS, § 187 (1959), and states that when a fiduciary exercises discretionary power granted to it by the plan, its decision will not be disturbed if reasonable. *Firestone*, 489 U.S. at 111. There is no hint in this Court's opinion in *Firestone* that a different standard applies if the setting of procedures is at issue rather than construction of terminology.

Petitioner next argues that the lower courts' decisions in this matter conflict with the holdings in *Torix v. Ball Corp.*, 862 F.2d 1428 (10th Cir. 1988) and *Helms v. Monsanto Co.*, 728 F.2d 1416 (11th Cir. 1984). This argument is also without merit. *Torix* and *Helms* each dealt with a plan fiduciary's determination of what would constitute a "total disability" for purposes of receiving disability benefits. The courts held that to recover disability benefits under an ERISA-covered plan, a plaintiff must "show physical inability to follow any occupation from which he could earn a reasonably substantial income rising to the dignity of an income or livelihood. . . . " *Torix*, 862 F.2d 1428, 1431, *quoting Helms*, 728 F.2d at 1421-22. Here, there was no dispute concerning the existence or extent of Petitioner's disability. For purposes of the Company's summary judgment motion, it

was stipulated that Petitioner was totally and permanently disabled in April, 1977. Therefore the *Torix* and *Helms* decisions have no bearing upon the issues in this case, and provide no justification for this Court's granting of certiorari.

Petitioner's third argument is that the lower courts' holdings in this case conflict with the Fourth and Tenth Circuits' rulings in *Rodriguez v. Meba Pension Trust*, 872 F.2d 69 (4th Cir. 1989) and *Straub v. Western Union Telegraph Company*, 851 F.2d 1262 (10th Cir. 1988). The Courts in *Rodriguez* and *Straub*, refused to give effect to oral or unilateral modifications to the terms of a pension plan. Again, Petitioner provides no justification for this Courts' review of the holdings in this case. Here, there was no oral or unilateral modification of the Pension Plan by the Plan Administrator. The Pension Plan expressly provided the Plan Administrator with discretionary authority to set procedures for the filing by members of the plan of applications for benefits. The fact that the Plan Administrator exercised such power in no way modifies the terms of the Pension Plan.

Petitioner then suggests that the Plan Administrator's determination of what constituted applying for benefits was a factual determination to which a *de novo* standard of review should have been applied. Petitioner states that if the Plan Administrator's determination in this case was a factual determination, the District Court's decision, made applying an abuse of discretion standard, would conflict with *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176 (3rd Cir. 1991) and *Reinking v. Philadelphia American Life Insurance Co.*, 910

F.2d 1210 (4th Cir. 1990). While it may be that the decisions in *Luby* and *Reinking* would implicate a different standard of review of factual determinations, there were no factual determinations at issue. The timing and existence of Petitioner's contacts with the Company and the Plan Administrator were undisputed. The only question before the Plan Administrator and reviewed by the District Court and the Court of Appeals was whether the Plan Administrator had the authority, under the discretionary powers given her by the Pension Plan, to decide what procedure must be followed to "apply" for benefits. There was no factual determination made, and there is no conflict with *Luby* or with *Reinking*.

Petitioner's last argument, that the lower courts' rulings permitted him to be denied a "full and fair review" of the denial of his claim, contrary to the holdings in an array of Court of Appeals cases cited by the Petitioner (Pet. at 37), is likewise without merit. No grounds for review on this basis would exist unless Petitioner had shown that he was prejudiced by the lack of a hearing. *See Sage v. Automation, Inc. Pension Plan & Trust*, 876 F.2d 885, 895 (10th Cir. 1988). Petitioner has not made even a minimal showing that such prejudice resulted. In fact, the District Court's findings in this matter, later adopted by the Court of Appeals, addressed Petitioner's claim that he was wrongfully denied a hearing, finding that no prejudice to Petitioner could have resulted, because all of the salient facts, including the date of submission and receipt of Petitioner's 1986 application for benefits were undisputed, and the Plan Administrator had determined that Petitioner was in fact disabled. Petitioner once again has

shown no reason why this court should review the lower courts' decisions.

CONCLUSION

The decision of the Plan Administrator in this matter was a reasonable exercise of discretionary authority granted to her by the Pension Plan to set the procedures to be used to apply for benefits under the Pension Plan, and should not be disturbed. Petitioner has failed to identify any relevant issue of law inadequately addressed by the District Court or the Court of Appeals, nor any conclusion drawn by either Court that in any material respect conflicts with the decisions of other federal or state courts. Petitioner has shown no grounds for this Court's exercise of its discretion to review the decision of the Court of Appeals in this case, and Respondent respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

SHERMAN & HOWARD L.L.C.
WALTER V. SIEBERT
Counsel of Record
633 Seventeenth Street
Suite 3000
Denver, Colorado 80202
(303) 297-2900

December 10, 1993.